

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

TONAWANDA COKE CORPORATION

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Criminal No. 10-cr-219-WMS-HKS

DEFENDANT TONAWANDA COKE CORPORATION'S
REPLY TO THE GOVERNMENT'S RESPONSE TO TONAWANDA COKE
CORPORATION'S SENTENCING MEMORANDUM

Defendant Tonawanda Coke Corporation ("Tonawanda Coke" or the "Company"), through undersigned counsel, hereby submits this Reply to the Government's Response to Tonawanda Coke's Sentencing Memorandum (the "Response"), filed September 30, 2013 [Docket No. 246].

INTRODUCTION

Tonawanda Coke submits that the government's Response is wholly unpersuasive in its attempt to discredit the Company's assessment of the mitigating factors that the Court should take into consideration in reaching its sentencing determination. As Tonawanda Coke discusses in detail herein, many of the statements contained in the affidavits appended to the government's Response and upon which the government bases the majority of its arguments, stand in stark contrast to the regulatory decisions and official actions taken over the past several years by the agencies that employ the affiants. While the government offers these affidavits in support of its overarching objective to secure an unreasonable criminal sentence against Tonawanda Coke, the government offers no explanation why the statements and opinions set forth in these affidavits are so fundamentally at odds with the regulatory record developed in the extensive parallel administrative and civil proceedings over the past four years. The credibility of the affidavits is

also undermined by the fact that the statements made by at least two of the affiants regarding the Company's more recent compliance activities are incomplete and do not fairly acknowledge the Company's on-going efforts to strengthen its environmental compliance program.

The government's Response also fails in its effort to justify its request for the Court to order Tonawanda Coke to fund certain community service projects as a condition of probation. Lastly, the government's challenge to the Company's ability to pay analysis is wholly without merit and again reflects the government's poor grasp of fundamental principles of financial analysis.¹

ARGUMENT

I. THE AFFIDAVITS PRESENTED BY THE GOVERNMENT DO NOT WARRANT RELIANCE BY THE COURT

In its Response to Tonawanda Coke's Sentencing Memorandum, the government appends affidavits from three individuals who testified at trial as expert witnesses on behalf of the government: James Strickland, Regional Engineer for NYS DEC Region 9; Harish Patel, environmental engineer for US EPA Region 2; and, Phil Flax, RCRA Section Chief for US EPA Region 2. In addition, the government relies upon these affidavits to support many of the arguments contained in its Response aimed at discrediting Tonawanda Coke's sentencing memorandum. For instance, citing to Mr. Strickland's affidavit, the government suggests that Tonawanda Coke has not changed its behavior with respect to environmental compliance and also that the remedial work and majority of the facility upgrades that the Company has

¹ Notably, the government's Response does not even address or dispute the legal analysis presented in Tonawanda Coke's sentencing memorandum regarding the absence of a legal basis for the Court to order Tonawanda Coke to make community service payments under the facts of this case. The Company considers the government's silence with respect to the Company's legal analysis a tacit acknowledgment that it is unable to dispute the Company's legal analysis of this threshold issue.

undertaken since the return of the Indictment against it were required by federal and/or state environmental laws. *See* Gov't's Response at p. 5. The government relies upon Mr. Patel's affidavit to refute the notion, which the government mistakenly perceives was asserted in Tonawanda Coke's sentencing memorandum, that the inclusion of the PRV in the HAP Emission Inventory satisfied the Company's obligation to disclose the PRV to the NYS DEC as an emission source in order to comply with its Title V operating permit requirements. *See* Gov't's Response at p. 7. Finally, Mr. Flax's affidavit is used by the government to dispute the Company's assertion that a remedial investigation of the coal field is not warranted as a condition of probation under the circumstances. *See* Gov't's Response at p. 11.

In Tonawanda Coke's view, the three affidavits presented by the government do not credibly support the government's arguments in favor of the imposition of an unreasonable and unwarranted sentence against Tonawanda Coke. Specifically, the government relies upon the affidavits to advance a distorted view of the facts regarding Tonawanda Coke's conduct in a manner similar to the view espoused in its own sentencing memorandum, to mischaracterize Tonawanda Coke's arguments in favor of sentencing mitigation, and to advance its argument that the Court should substitute its judgment for the regulatory expertise and enforcement authority of the NYS DEC and US EPA. In light of these issues, Tonawanda Coke strongly urges this Court to see the government's affidavits for what they are—vehicles for advancing the government's unreasonable sentencing recommendation to the Court—and to not rely upon them in the Court's determination of a reasonable and just sentence for the Company.

A. Affidavit of James Strickland

Mr. Strickland's affidavit exemplifies the government's pattern of misrepresentations and mischaracterizations of fact to wrongfully portray Tonawanda Coke as an inveterate wrongdoer

in an effort to obtain an unreasonable sentence.² Mr. Strickland's affidavit is most notable for its misguided attempt to discredit the veracity of the declaration submitted by Tonawanda Coke's environmental regulatory counsel, Rick Kennedy, in support of Tonawanda Coke's sentencing memorandum (the "September 13 Declaration") and to suggest that the Company has undertaken no meaningful steps to improve its environmental compliance activities following its conviction.

1. Mr. Strickland's Affidavit Contains Numerous Factual Inaccuracies and Mischaracterizations

In the Supplemental Declaration of Rick W. Kennedy (the "Supplemental Declaration"), attached hereto as Attachment A, Mr. Kennedy goes point by point through Mr. Strickland's affidavit to correct the factual inaccuracies contained in his affidavit and to provide additional clarification and documentation to the Court, where necessary. For instance, Mr. Strickland's affidavit states that Mr. Kennedy's September 13 Declaration inaccurately portrays the status of the negotiations and remedial work at one of the State Superfund operable units on property owned by the Company, Area 108 (OU3). As noted in the Supplemental Declaration, the Company's consultant on this matter, Conestoga-Rovers & Associates ("CRA"), engaged NYS DEC directly on the scope of work for Area 108, and had written approval of the essential elements of the remedial work to be undertaken. However, due to the demands by NYS DEC and US EPA during this same time period for major projects in other areas of its facility, CRA

² At the outset, Mr. Strickland's affidavit points out that the NYS DEC engineer who expressed his view that Tonawanda Coke's management had demonstrated their ability to operate a clean coke battery going back thirty years was no longer an employee of the NYS DEC at the time that he expressed his opinion. *See* Exhibit 7 to Gov't's Response at ¶ 5. Nevertheless, Mr. Strickland's affidavit does not challenge the substance of the statement that the opinion of the engineer was that the management of Tonawanda Coke made it the "cleanest [coke battery] in the country" after it was acquired from Allied Chemical.

advised NYS DEC that it could not commit to a specific implementation schedule until such time as those other projects had been addressed.

Additionally, Mr. Strickland's affidavit takes issue with Mr. Kennedy's description of the remedial determination issued by NYS DEC for Areas 109 (OU2) and 110 (OU1) of the State Superfund Site as requiring "no further action." *See* Exhibit 7 to Gov't's Response at ¶¶ 10-12. Mr. Strickland's assertion is inconsistent with the document setting forth NYS DEC's remedial decision. Appended to the Supplemental Declaration is the NYS DEC's Record of Decision, issued in March 2008 (the "Record of Decision"), with respect to Areas 109 and 110. The Record of Decision expressly concludes that, aside from the institutional and engineering controls (*e.g.*, restrictions on the use of the property and fencing) required under the Record of Decision, no further action was warranted for Areas 109 and 110. *See* Supplemental Declaration at ¶ 8; Exhibit E to the Supplemental Declaration at p. 9 ("[b]ased on the above information, the Department selected *no action* with the provision of Institutional/Engineering Controls as the remedy for OU1 and OU2") (emphasis added).

The NYS DEC's Record of Decision was issued in reliance upon the Final Supplemental Report and Feasibility Study Report (the "Final Supplemental Report"), which was prepared by Tonawanda Coke's environmental consultant, CRA, and submitted to NYS DEC in January 2008. Strikingly, at no time since the Final Supplemental Report was submitted to NYS DEC more than five and a half years ago has the agency formally or informally objected to the findings and conclusions contained in the report. Mr. Strickland's affidavit is the first time since the Final Supplemental Report was submitted to NYS DEC in January 2008 that any representative of the agency has registered any disagreement with the findings and conclusions contained in the report. It is disingenuous and simply unbelievable that the NYS DEC, if it had

legitimate questions or disagreements with the findings and conclusions reflected in the Final Supplemental Report, would proceed to issue its Record of Decision in reliance on that report and then wait more than five and a half years to express disagreements through the vehicle of an affidavit submitted to this Court. Yet, that is precisely what Mr. Strickland's affidavit purports to do. *See* Exhibit 7 to Gov't's Response at ¶¶ 11-16, 19.

The Supplemental Declaration also addresses Mr. Strickland's suggestion that Tonawanda Coke has failed to meet compliance standards with respect to a number of recent inspections at the facility and that this is a reflection of the Company's failure to implement any meaningful change in its environmental compliance practices in the wake of its conviction. *See, e.g.* Exhibit 7 to Gov't's Response at ¶¶ 28-31, 34. With respect to observations of dusty pushes at the facility, Mr. Kennedy notes that he reported this issue on behalf of Tonawanda Coke to the NYS DEC before any citizen complaints were registered. *See* Supplemental Declaration at ¶ 10(b). The Company then responded to NYS DEC's September 3, 2013 request for further information in a timely fashion. *Id.* Based on the information provided by the Company, NYS DEC subsequently submitted a request for additional information to the Company regarding this issue on October 4, 2013, which the Company is now reviewing. Similarly, with respect to the observation of visible emissions allegedly made by NYS DEC staff on September 24, 2013, Tonawanda Coke promptly investigated this issue upon being informed of the observation and identified a potential cause of the visible emission for the NYS DEC. *See* Supplemental Declaration at ¶ 10(c). NYS DEC did not issue a formal Notice of Violation regarding the visible emissions until October 2, 2013, which the Company is now reviewing. Lastly, the Supplemental Declaration properly addresses the context in which an Administrative Order was issued by the Town of Tonawanda treatment facility (the "Town") to the Company on September

5, 2013, explaining that it resulted from Tonawanda Coke's submission of a Mercury Reduction Plan to the Town as part of its ongoing efforts to comply with a new mercury limitation in its re-issued Industrial User permit. *See* Supplemental Declaration at ¶ 11. The Administrative Order was not required due to any prior exceedances of the Company's cyanide limit in its Industrial User permit nor has the Company been issued any formal Notice of Violation by the Town for a cyanide exceedance in calendar year 2013.

The third point that the Supplemental Declaration addresses with respect to Mr. Strickland's affidavit is his suggestion that the Court should discount the substantial funds Tonawanda Coke has expended or that it intends to expend to address NYS DEC and US EPA administrative actions against the Company on the grounds that the "majority of the work undertaken" by Tonawanda Coke is "required by federal and/or state environmental laws." *See* Exhibit 7 to Gov't's Response at ¶ 40. This assertion is incorrect and misleading. Much of the work that Tonawanda Coke has undertaken over the past four years to upgrade, rehabilitate, modify and replace equipment and other installations at the facility has been carried out pursuant to the agencies' newly expressed broad interpretations of regulatory general duty clauses under the Clean Air Act and the Clean Water Act and not pursuant to express regulatory requirements. *See* Supplemental Declaration at ¶ 12. Moreover, the most significant project that Tonawanda Coke has committed to undertake—the installation of pushing emission controls on the coke oven battery —has been agreed to in response to the agencies having recently advised Tonawanda Coke that the exemption that the NYS DEC granted to the Company in 1981 from such controls will not extend to any future Title V permit regulating the plant. Ultimately, the implementation of these measures is viewed, by the Company and its consultants, as best practices which will advance the Company's environmental compliance program.

2. *Empirical Data Indicating That the PRV Was Not a Significant Source of Benzene Emissions*

Mr. Strickland's affidavit also challenges the analysis submitted to the Court as Exhibit 9 to Tonawanda Coke's sentencing memorandum suggesting that empirical data appear to indicate that the PRV was not a significant source of benzene emissions from the Tonawanda Coke facility, contrary to the arguments advanced by the government throughout trial.³ Thomas Ferrara, Project Manager at CRA, has submitted an affidavit, attached hereto as Attachment B, responding to Mr. Strickland's arguments. Mr. Ferrara's affidavit specifically responds to Mr. Strickland's criticism of the methods employed by CRA in reaching its conclusions. For instance, Mr. Ferrara notes that CRA's analysis accounted for such factors as the emission rate of the PRV, the dispersion rate of the coke oven gas plume, wind direction and the distance of the air monitor from the PRV. *See Ferrara Affidavit at ¶¶ 8-12.*

Most significantly, while Mr. Strickland's affidavit appears to disagree with CRA's attribution of the 50 percent reduction in benzene emissions following the shutdown of the light oil recovery system at the facility to wind dispersion rates,⁴ it acknowledges that benzene

³ The government's response to Tonawanda Coke's sentencing memorandum cites to case authority purporting to demonstrate that expert testimony as to the extent of environmental contamination resulting from the Company's conduct is unnecessary, as the Court may "infer environmental contamination from the evidence introduced." *See Gov't's Response at p. 10.* Tonawanda Coke disagrees with this assertion. The case authority cited by the government, *United States v. Liebman*, 40 F.3d 544, 550-51 (2d Cir. 1994) and *United States v. Ferrin*, 994 F.2d 658, 664 (9th Cir. 1993), concerns whether a sentencing enhancement for causing environmental contamination under the Sentencing Guidelines applies to individual defendants. It does not apply to organizational defendants and therefore is inapplicable to the instant case. Moreover, Tonawanda Coke submits that a proper analysis of the sentencing factors under 18 U.S.C. §§ 3553 and 3572 requires the Court to take into consideration the extent and degree of the harm caused by the Company's conduct. The experts proffered by Tonawanda Coke are intended to assist the Court in this consideration.

⁴ Mr. Strickland's affidavit states that the NYS DEC found that following the removal of the PRV from service, there was an approximately 12 to 14 percent decrease in average benzene

emissions did in fact decline by 50 percent following the shutdown of the light oil recovery system. *See* Exhibit 7 to Gov't's Response at ¶ 22. The light oil recovery system removed benzene, toluene and xylene ("BTX") from the coke oven gas stream. Accordingly, if the PRV was a significant source of benzene emissions, as the government has vociferously argued throughout this case, then the empirical data would be expected to reflect an overall increase in benzene emissions attributable to the releases from the PRV following the shutdown of the light oil recovery system. CRA's analysis highlights, however, that this was in fact not the case. This empirical data strongly supports the Company's belief that the PRV did not result in a significant level of benzene contamination into the environment, and that this should be taken into consideration as a mitigating factor by the Court in its sentencing determination with respect to the counts of conviction related to the PRV.

Mr. Strickland's affidavit is exceptionally misleading in its characterization of the 86 percent reduction of ambient air benzene concentrations from the levels originally detected during the joint NYS DEC / US EPA inspection of the Tonawanda Coke facility in April 2009. The affidavit appears to suggest that this reduction was the direct result of operational modifications made by Tonawanda Coke pursuant to administrative orders issued by the NYS DEC and US EPA in July 2011 to put in place a compliant leak detection and repair program ("LDAR"). *See* Exhibit 7 to Gov't's Response at ¶ 25. This is factually incorrect. Mr. Strickland fails to mention that there was a substantial reduction in coke production at

concentration and a seven percent increase in the wind speed. *See* Exhibit 7 to Gov't's Response at ¶ 23. In the next sentence, Mr. Strickland characterizes the conditions before and after the removal of the PRV and notes that the "wind speed was *essentially the same* prior to and after the removal of the PRV from service." *See id* (emphasis added). In the Company's view, a seven percent increase in wind speed in fact represents a significant differential that would need to be factored into any reliable dispersion analysis.

Tonawanda Coke from 2009 to 2012. This would have resulted in a corresponding reduction in coke oven gas production, which would have significantly impacted ambient air benzene concentrations. *See* Ferrara Affidavit at ¶ 14. Mr. Strickland also fails to consider the likelihood that, given the widespread awareness of NYS DEC's increased monitoring and enforcement activities at the Company's facility, as well as the agency's review of data from the Tonawanda Community Air Quality Study, changes in the operating practices and/or equipment of other operators situated in the Tonawanda industrial corridor contributed to the reduction in ambient air benzene concentrations. Moreover, Mr. Strickland fails to mention that the requirements for the LDAR program mandated in the National Emission Standard for Benzene Emissions from Coke By-Product Recovery found at 40 CFR 61 Subpart L, specifically requires LDAR testing of a wide range of components in the Company's byproduct plant, but the coke oven gas piping system is not included in the regulation.

B. Affidavit of Harish Patel

Mr. Patel's affidavit is emblematic of the government's general mischaracterization of certain of Tonawanda Coke's arguments in favor of sentencing mitigation. The government asserts, through Mr. Patel's affidavit, that the Hazardous Air Pollution ("HAP") Emission Inventory Report submitted to the NYS DEC in 2003 did not satisfy Tonawanda Coke's notification obligations under the Title V program and that Tonawanda Coke's sentencing memorandum wrongly implies "that it is the obligation of state and federal regulators to find all emission sources, regardless of whether the emission source is listed in the facility's Title V Permit." *See* Response at p. 7; *see also* Exhibit 8 at ¶¶ 6-7. In making these assertions, Mr. Patel is attacking a straw man of his own creation.

Tonawanda Coke does not contend and has not contended that the HAP Emission Inventory Report satisfied the Company's reporting obligations under the Title V permit or even that it excused Tonawanda Coke's failure to disclose the existence of the PRV in its Title V operating permit application. Rather, the Company has explained that its inclusion of the PRV in Table 4-1 of the HAP Emission Inventory Report belies the government's central allegation that Tonawanda Coke "actively concealed" the existence of the valve. *See* Gov't's Sentencing Memorandum at p. 9. Notwithstanding the fact that this allegation is not supported by the evidence submitted at trial or by the jury's verdict, the Company submits that the reference to the PRV in Table 4-1 fully corroborates its position that it voluntarily notified the NYS DEC of the existence of the PRV and that it did not seek to conceal the PRV from NYS DEC regulators. As misguided as the Company's error may have been to not include a reference to the PRV in its Title V operating permit, the full record in this case makes it clear that the decision was *not* made in an effort to conceal the PRV from the NYS DEC or US EPA.

C. Affidavit of Phil Flax

Relying upon the affidavit of Phil Flax, the government asserts that a remedial investigation is necessary now because none of the previous remedial actions at the facility addressed "the potential contamination caused by mixing of hazardous wastes in the coal fields, as that conduct was never brought to the government's attention until the events which were the subject of the Indictment." *See* Gov't's Response at pp. 11-12; *see also* Exhibit 11 at ¶¶ 6-9. Neither Mr. Flax nor the government offers any explanation why, if there was a legitimate concern regarding potential contamination in the coal field based on information both NYS DEC and US EPA possessed at least as of 2009, neither agency has taken any specific steps to require RCRA corrective actions over the past four years. In fact, the government's argument and Mr.

Flax's statements to the effect that a Court ordered remedial investigation of the coal fields is now necessary flies in the face of the NYS DEC and US EPA's apparent finding that such an investigation is not warranted, given the agencies' silence on this issue in the more than four years that have elapsed since they acknowledge they became aware of the Company's conduct.⁵ This is simply incomprehensible. If the US EPA or the NYS DEC believed in the possibility of contamination in the coal field or that a remedial investigation was warranted then they had every opportunity and, in fact, a duty to require the Company to initiate a remedial investigation in the years prior to the conclusion of the criminal case; the agencies' failure to do so fundamentally discredits the government's whole argument that a remedial investigation is now necessary.

Moreover, the government's argument that the Court should require a remedial investigation of the coal fields has significant implications for the disposition of this case by the Court that the government seems to neglect entirely. The entry of such a remedial order by this Court would place the Court in the position of having to make decisions regarding the required extent of the investigation, to evaluate the findings of the investigation, and to then make determinations regarding the need for and extent of any remediation. Such judgments and decisions are patently within the regulatory authority and responsibility of the environmental regulatory agencies, not with a district court in a criminal sentencing proceeding. Tonawanda Coke presumes that one of the special conditions of probation that will be imposed by this Court

⁵ There is no dispute as to whether the agencies were aware of Tonawanda Coke's practice of placing the K087 on the coal piles in the coal fields at least as of 2009. Mr. Flax's affidavit acknowledges that the NYS DEC and US EPA were aware of this practice based on information obtained during joint RCRA inspections conducted with the NYS DEC in June and September 2009 and on the actions that the US EPA took to address this practice in the aftermath of these investigations. *See* Exhibit 11 to Gov't's Response at ¶¶ 6-7.

at the time of sentencing will be a requirement that the Company comply with all Compliance Orders issued by either the NYS DEC or the US EPA. The Company respectfully submits that such a condition would be the more appropriate and reasonable method for addressing any issue of potential contamination of the coal field.⁶

Similar to Mr. Strickland's affidavit, Mr. Flax's affidavit voices previously unexpressed concerns with the NYS DEC's 2008 Record of Decision. *See* Exhibit 11 to Gov't's Response at ¶ 10. The same arguments that apply to Mr. Strickland's affidavit with respect to this issue apply to Mr. Flax's. Like the NYS DEC, the US EPA has, at no time prior to the submission of the government's Response, registered objections to the findings of the Final Supplemental Report or the NYS DEC's Record of Decision. Mr. Flax's affidavit, attached to the government's Response, is an inappropriate vehicle for the US EPA to now purport to express such concerns.⁷

II. THE GOVERNMENT'S RESPONSE BRIEF IS INFECTED BY ITS PERVASIVE MISCHARACTERIZATIONS OF TONAWANDA COKE'S CONDUCT AND COMPLIANCE RECORD

The government goes to great lengths to portray Tonawanda Coke as a company that persistently "flaunted the authority of the regulatory agencies" and that "sought practically every regulatory exemption possible with the sole purpose of maximizing profits." *See* Gov't's

⁶ The Company notes that K087 is a listed hazardous waste because its hazardous constituents are phenol and naphthalene. *See* 45 Fed. Reg. 47832 (July 16, 1980) (codified at 40 C.F.R. pt. 261, Appendix VII). These same compounds are present in coal. Moreover, the volume of coal in the coal field dwarfs the amount of any K087 that might be present there. For these reasons, any remedial investigation into potential contamination caused by the practice of placing K087 on the coal piles in the coal fields would be a literal "fool's errand", as there would be no basis for concluding hazardous releases present in the coal field are from the K087 rather than the coal itself.

⁷ Mr. Flax criticizes the Record of Decision at least in part for its reliance upon sampling activities that were conducted in 1992. Tonawanda Coke submits that the NYS DEC was aware of the time period in which the sampling activities were conducted in 2008 when it reviewed the Final Supplemental Report and issued its Record of Decision. Mr. Flax does not identify any newly discovered basis to challenge the validity of those sampling activities now.

Response at pp. 2-4. This characterization of Tonawanda Coke distorts the facts and assigns motivations to Tonawanda Coke's conduct that are simply not true. Application for a regulatory exemption is a matter of common practice and does not implicate a company in wrongdoing. Moreover, in the case of the Company's request for an exemption from pushing emission controls, the NYS DEC validated the basis for the Company's exemption request and, accordingly, granted the exemption. The government then compounds its distorted rendition of the regulatory history by adding the misleading suggestion that the Company deliberately undermined the pushing emission control exemption that NYS DEC had granted by having its employees interfere with the Method 303 inspection process. This is directly belied by the testimony at trial. The trial record is clear that: the Company had an unambiguous policy in place prohibiting the back pressure on the coke oven battery from being lowered to mask emissions from method 303 inspectors; this policy was communicated by management to Tonawanda Coke employees; and, employees who flouted the policy faced discipline, including termination of their employment. The government's renewed effort to attribute to the Company the isolated conduct of certain rogue employees who were thereafter disciplined or discharged for their conduct is a true measure of the lengths to which the government will go in its effort to throw whatever dirt it can get its hands on to "dirty up" the Company.

The government also claims that another example of Tonawanda Coke's "direct contravention of regulatory directives" included the operation of the battery flare stack without an automatic igniter. *See* Gov't's Response at p. 4.⁸ The Company has not sought to defend the extinguishment of the pilot light for the flare stack. Nevertheless, it is reasonable to note that the

⁸ The government also points to the Company's operation of Quench Tower No. 2 without baffles as an indication of Tonawanda Coke's persistent misconduct. The Company has acknowledged in its sentencing memorandum that baffles should have been in place earlier. *See* Tonawanda Coke's Sentencing Memorandum at p. 8.

battery flare stack is an emergency flare stack with a manual valve that is used on an extremely limited basis. In this context, the government's effort to portray the Company's failure to operate the battery flare stack with an automatic igniter as an example of Tonawanda Coke's persistent flaunting of regulatory requirements clearly exaggerates the environmental significance of this particular violation.

III. THE GOVERNMENT HAS NOT JUSTIFIED ITS ARGUMENT IN FAVOR OF COURT ORDERED COMMUNITY SERVICE PAYMENTS

While acknowledging that it has not identified any particular individual victims in this case, the government claims, as a basis for its recommendation that the Court order Tonawanda Coke to make community service payments, that the "defendant's conduct directly and proximately harmed the air and ground surrounding Tonawanda Coke." *See* Response at p. 9. Though it bears no relevance whatsoever to community service payments, the government then cites to a commentary note to United States Sentencing Guidelines Manual (U.S.S.G. or the "Sentencing Guidelines") § 3D1.2 to make the tortuous and misleading argument that this alleged harm to the air and ground surrounding Tonawanda Coke constitutes a "societal interest that is harmed" and that, as such, it is the "victim" of Tonawanda Coke's offensive conduct.

First, U.S.S.G. § 3D1.2 relates to the grouping of counts involving the same harm for the purpose of sentencing. The Guideline characterizes such counts as, *inter alia*, relating to the same victim and the same act or transaction. *See* U.S.S.G. § 3D1.2(a). This guideline is not intended to apply to offenses committed by organizational defendants. Moreover, the government's citation to note 2 to the commentary to U.S.S.G. § 3D1.2 is incomplete.⁹ It is clear

⁹ Commentary note 2 to U.S.S.G. § 3D1.2 states:

The term "victim" is not intended to include indirect or secondary victims. Generally, there will be one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim. For offenses in which there

from the language of this commentary note that it is intended to provide a framework for the court to group offense counts together for the purpose of sentencing for offenses in which there is no identifiable victim. This commentary note has no connection whatsoever to the issue of whether community service payments are appropriate as part of a court's imposition of sentence on an organizational defendant.

Second, as Tonawanda Coke explained at length in its response to the government's sentencing memorandum, the government's attempt to justify its request for community service payments based on a nebulous claim of some kind of communal or societal victim is inflammatory, has no place in the applicable statutory provisions or Sentencing Guidelines related to community service payments and appears plainly designed to circumvent the fact that Court ordered restitution is inappropriate in this case because there are no identifiable victims. *See* Tonawanda Coke's Response to Gov't's Sentencing Memorandum at pp. 15–19.

IV. THE GOVERNMENT'S CRITICISM OF TONAWANDA COKE'S ABILITY TO PAY ANALYSIS IS MERITLESS

The government concludes its response to Tonawanda Coke's sentencing memorandum by attempting to poke holes in the financial analysis that Tonawanda Coke prepared regarding its

are no identifiable victims (*e.g.*, drug or immigration offenses, where society at large is the victim), the "victim" for purposes of subsections (a) and (b) is the societal interest that is harmed. In such cases, the counts are grouped together when the societal interests that are harmed are closely related. Where one count, for example, involves unlawfully entering the United States and the other involves possession of fraudulent evidence of citizenship, the counts are grouped together because the societal interests harmed (the interests protected by laws governing immigration) are closely related. In contrast, where one count involves the sale of controlled substances and the other involves an immigration law violation, the counts are not grouped together because different societal interests are harmed. Ambiguities should be resolved in accordance with the purpose of this section as stated in the lead paragraph, *i.e.*, to identify and group "counts involving substantially the same harm."

ability to pay a criminal fine.¹⁰ Specifically, the government criticizes the analysis for its failure to note that while sales of foundry coke declined 11.1 percent from the previous year for the year ended June 30, 2013, the tonnage of total coke products produced by Tonawanda Coke increased during the fiscal years ending 2010, 2011 and 2012. In making this claim, the government omits the fact that, consistent with the decline in foundry coke sales for the year ended June 30, 2013, the tonnage of total coke products produced by Tonawanda Coke declined 2.4 percent over the same time period. Notwithstanding this omission, the government's point regarding the increase in total tonnage of coke products produced from 2010 to 2012 is not material to the integrity of Tonawanda Coke's financial analysis.

While historical information is informative and may provide some insight into future earnings, a company's ability to pay a fine is solely dependent upon current assets and future cash flows. In this regard, identifying trends in cash flow is paramount to assessing a company's

¹⁰ The government tries to discredit Tonawanda Coke's financial analysis by undermining the credentials of Stephen Scherf, CPA, Principal of the financial and economic consulting firm, Asterion, Inc. *See* Gov't's Response at p. 12. The government's statement that Mr. Scherf "has no experience rendering ability to pay assessments in federal criminal cases" is misleading. Mr. Scherf has prepared numerous analyses of companies' ability to pay punitive damages, which are analogous to the analysis he conducted in the instant case. In addition, Mr. Scherf was previously employed by the United States Attorney's Office for the Eastern District of Pennsylvania to assist in determining a defendant's ability to pay in a civil matter brought by the US EPA.

The government also suggests that Mr. Scherf's analysis is tainted because much of the financial data and data regarding market conditions he relied upon were supplied by Tonawanda Coke. *See* Gov't's Response at p. 12. The government's allegation has zero merit. Mr. Scherf prepared his financial analysis primarily based upon the Company's audited financial statements, which were prepared by Tonawanda Coke's Independent Certified Public Accountants, Chiampou Travis Besaw & Kershner, LLP. Moreover, with the exception of the Coke Market Reports, all market data were obtained by Mr. Scherf through his firm's independent research. The Coke Market Reports are published by Resource-Net, which is a paid subscription service. As Tonawanda Coke maintains a subscription to this service, the Company provided Mr. Scherf with the Coke Market Reports he requested in order to avoid unnecessarily increasing the cost of Mr. Scherf's engagement.

ability to pay. The government's criticism of Tonawanda Coke's analysis of its ability to pay a criminal fine fails to take this fundamental principle into account and, as a result, merits no consideration by the Court.¹¹

In the instant case, the government points to the fact that Tonawanda Coke earned a total profit of \$59,905,990 for the period from June 30, 2005 to June 30, 2012 in an effort to undermine the conclusion of Tonawanda Coke's financial analysis that the Company's ability to pay a criminal fine is limited to approximately \$1 million per year. While it is true that net income for the eight years between 2005 through 2012 was \$59,905,990 (an average annual net income of \$7,488,249), for the four year period from 2010 to 2013 net income for Tonawanda Coke only amounted to \$11,872,730. This represents an average annual net income of \$2,968,182, which is less than half of the average annual income that the Company earned from 2005 to 2012. For 2013, Tonawanda Coke earned a net income of \$1,156,806. This sharply declining trend in annual net income underscores the significance of the government's failure to analyze trend data for the Company in preparing its own ability to pay analysis and gives strong credence to the Company's position that its ability to pay a criminal fine is limited to approximately \$1,000,000 per year.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Tonawanda Coke's Sentencing Memorandum, Tonawanda Coke submits that the recommendation proposed in Tonawanda Coke's Sentencing Memorandum reflects a punishment that is sufficient, but not greater than necessary, to serve the purposes of sentencing. Accordingly, Tonawanda Coke urges the Court

¹¹ Indeed, as Tonawanda Coke explained at length in its response to the government's sentencing memorandum, the government's own analysis is indicative of its total failure to appreciate the significance of Tonawanda Coke's overall financial performance and its bearing upon the Company's ability to pay a fine in the instant case.

to reject the arguments advanced in the government's Response and to impose a sentence consistent with the Company's analysis of the sentencing factors contained in its sentencing memorandum.

DATED: Washington, D.C.
October 7, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of October 2013, I electronically filed the foregoing
DEFENDANT TONAWANDA COKE CORPORATION'S REPLY TO THE
GOVERNMENT'S RESPONSE TO TONAWANDA COKE CORPORATION'S
SENTENCING MEMORANDUM with the Clerk of the District Court using the CM/ECF
system, which sent notification of such filing to the following CM/ECF participants on this case:

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